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**UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA**

IN RE: VOLKSWAGEN “CLEAN DIESEL”  
 MARKETING, SALES PRACTICES, AND  
 PRODUCTS LIABILITY LITIGATION

) MDL No. 2672 CRB

) **DEFENDANTS’ MOTION FOR  
 PARTIAL SUMMARY JUDGMENT**

\_\_\_\_\_  
 This Document Relates to:

) The Honorable Charles R. Breyer

*Environmental Protection Commission of  
 Hillsborough County, Florida v. Volkswagen  
 AG et al., No. 16-cv-2210 (N.D. Cal.)*

) Hearing: Sept. 16, 2022 at 9:00 a.m.

*Salt Lake County v. Volkswagen Group of  
 America, Inc. et al., No. 16-cv-5649 (N.D. Cal.)*

**NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE that on September 16, 2022, at 9:00 a.m., in Courtroom 6 of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California 94102-3489, Defendants Volkswagen Group of America, Inc. (“VWGoA”), Audi of America, LLC (together with VWGoA, “Volkswagen”), Porsche Cars North America, Inc. (“PCNA”), and Robert Bosch LLC (“Bosch”; collectively, “Defendants”) will and hereby do move this Court for summary judgment on the following claims: (i) all of Plaintiff Hillsborough County’s claims; (ii) Plaintiff Salt Lake County’s first and fourth claims for relief; and (iii) Plaintiff Salt Lake County’s third claim for relief to the extent that it is premised on a predicate violation of Utah Admin. Code R307-201-4.

This Motion is made pursuant to Federal Rule of Civil Procedure 56 and is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, the accompanying declaration of Nicholas F. Menillo (the “Menillo Decl.”) and the exhibits thereto, including the Expert Report of Ryan Harrington, all pleadings and papers filed herein, oral argument of counsel, and any matter which may be submitted at the hearing.

Dated: July 22, 2022

Respectfully submitted,

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**MEMORANDUM OF POINTS AND AUTHORITIES**

Defendants Volkswagen Group of America, Inc. (“VWGoA”), Audi of America, LLC (together with VWGoA, “Volkswagen”), Porsche Cars North America, Inc. (“PCNA”), and Robert Bosch LLC (“Bosch”; collectively, “Defendants”)<sup>1</sup> respectfully submit this Motion for Partial Summary Judgment and the supporting Declaration of Nicholas F. Menillo, pursuant to the Court’s July 15, 2022 Order (ECF No. 8003).

**ISSUE TO BE DECIDED**

Whether the Court should grant Defendants summary judgment dismissing the claims of Hillsborough County, Florida and Salt Lake County, Utah (together, the “Counties”) seeking to challenge Volkswagen’s installation of replacement engine control unit (“ECU”) software in VW- and Audi-brand model year 2010 to 2014 2.0-liter diesel vehicles (the “Affected Vehicles”), because no genuine dispute exists that the replacement software did not increase emissions from those vehicles.

**SUMMARY OF ARGUMENT**

The Counties’ only remaining claims in this action seek to penalize Defendants for the installation of replacement software on cars at dealerships in Hillsborough and Salt Lake Counties. Volkswagen AG developed the replacement software in 2014 to address high on-road NOx emissions identified in the Affected Vehicles in a study conducted by researchers at the West Virginia University (“WVU”) that was published in early 2014. In response to that study, Volkswagen AG developed new replacement ECU software that increased the frequency of the operation of emissions controls during “road mode.” From 2014-2016, dealers installed the replacement software on cars through a single software file, which completely removed and replaced the preexisting ECU software on the Affected Vehicles.

In late 2014, engineers at Volkswagen AG performed on-road testing of the replacement software using a portable emissions measurement system (“PEMS”)—a device that attaches to the tailpipe of a vehicle and measures emissions during real-world driving, not on a dynamometer (or “dyno”). The PEMS testing showed that the replacement software caused a

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<sup>1</sup> Bosch is not a party to the Salt Lake County action.

1 significant reduction in NOx emissions. Volkswagen AG then presented these test results to the  
 2 California Air Resources Board (“CARB”), which then performed its own PEMS testing and  
 3 confirmed that the replacement software resulted in “significant” reductions in NOx emissions  
 4 over a wide range of driving conditions. In fact, CARB observed reductions in emissions of NOx  
 5 of *up to 77.5%*. (See Section E *infra*.)

6 On the basis of CARB’s testing, both EPA’s and CARB’s September 18, 2015  
 7 Notices of Violation (“NOVs”) expressly recognized that the replacement software reduced NOx  
 8 emissions.<sup>2</sup> As a result, even after the NOVs, Volkswagen continued to install the replacement  
 9 software on Affected Vehicles until October 2016, when Volkswagen entered into its settlements  
 10 with EPA and CARB providing for the installation of new replacement software (the AEMs) that  
 11 further reduced NOx emissions. (See Section F *infra*.)

12 Following the NOVs—as part of Volkswagen’s defense in litigation brought by the  
 13 State of Texas and certain Texas counties—the engineering and scientific consulting firm,  
 14 Exponent, conducted a comprehensive series of PEMS tests, based on CARB’s testing plan, that  
 15 again confirmed significant emissions reductions across a broad cross section of vehicles and  
 16 driving conditions. In fact, Exponent’s testing showed an average emissions reduction of 45%  
 17 among Generation 1 Affected Vehicles and 50% among Generation 2 Affected Vehicles.  
 18 Volkswagen has provided these test results to the Counties and has made them part of this motion  
 19 for summary judgment. (See Section G *infra*.) To date, the Counties have cited no evidence that  
 20 the replacement software increased emissions.

21 In its February 23, 2022 Order denying the Counties’ motion to remand, this Court  
 22 rightly recognized that “[t]he Hillsborough County and Utah regulations appear to exclude from  
 23 liability post-sale changes that reduce emissions.” (Feb. 23 Order at 2 (ECF No. 7944).) By its  
 24 terms, the Utah anti-tampering rule expressly permits the removal of emissions software and its  
 25 replacement with software “which is equally or more effective in reducing emissions from the  
 26 vehicle to the atmosphere.” Utah Admin. Code R307-201-4. Similarly, Utah’s nuisance law only

27 \_\_\_\_\_  
 28 <sup>2</sup> See CARB In-Use Compliance Letter (Ex. A) (“[o]ver-the-road PEMS testing showed that the recall calibration did reduce the emissions”); EPA Notice of Violation (Ex. B) (replacement software provided a “limited *benefit*” (emphasis added).)



bars conduct that “annoys, injures, or endangers the comfort, repose, health, or safety” of the public or causes the public to be “insecure in life or the use of property,” which cannot result from an act that reduces emissions. *See* Utah Code Ann. § 76-10-803(1). And Hillsborough’s anti-tampering rule requires Hillsborough to show that the replacement software “circumvented,” “defeated,” or “deleteriously affected,” the emissions control system, EPC Rule 1-8.03(2)(c), (h); 1-8.05(1), (6)—meaning that Hillsborough can prevail only if the replacement software rendered the emissions control system “even less functional than it had been with the original defeat device.” *Env’t Prot. Comm’n of Hillsborough Cnty. v. Mercedes-Benz*, 2022 WL 1136610, at \*5-6 (M.D. Fla. Apr. 18, 2022).

In its July 15, 2022 Order, the Court rejected the Counties’ theory that “constituent features of a software update can qualify as separate instances of tampering under the Counties’ regulations” and held that “any modification or alleged tampering that was accomplished at one time is indivisible and can qualify as only one instance of tampering under the relevant regulations.” (July 15 Order at 1-2 (ECF No. 8003).)

Accordingly, this case is now straightforward and ripe for summary judgment. The Counties cite *no* evidence showing the replacement software made emissions *worse*—as required to establish liability. Nor is there any indication that the Counties will be able to do so with yet more discovery. Indeed, the evidence is overwhelming and uncontroverted that the replacement software *reduced* NOx emissions from the Affected Vehicles on which it was installed—and did so *by a significant amount*. Because there is no genuine dispute that the challenged replacement software reduced emissions, and there are no other disputed material facts, the Court should enter summary judgment dismissing the Counties’ claims under their anti-tampering provisions and for nuisance as a matter of law.<sup>3</sup>

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<sup>3</sup> As noted in prior briefing (ECF No. 7965, at 5 n.2), only 2.0-liter diesel engine cars received the replacement software, there are no 2.0-liter Porsche vehicles, and no Porsche vehicles received the replacement software challenged by the Counties. Likewise, Bosch LLC was not involved in the design, programming, calibration, or distribution of the replacement software. Thus, while PCNA and Bosch LLC are entitled to summary judgment on the basis that the challenged replacement software reduced emissions, the Counties’ claims against PCNA and Bosch LLC fail for these additional reasons.

## EVIDENTIARY RECORD

### A. The Affected Vehicles

After dismissal on federal preemption grounds of their claims based on factory installation of “defeat device” software, the Counties’ lawsuits now only challenge the installation of the replacement software in the Affected Vehicles.<sup>4</sup> The Affected Vehicles used various emissions control strategies to limit the emissions of NOx and other pollutants. Two “generations” of Affected Vehicles received the replacement software: Generation 1 (“Gen 1”),<sup>5</sup> which used a technology known as a “lean NOx trap” (“LNT”) as their primary NOx control system, and Generation 2 (“Gen 2”),<sup>6</sup> which instead used a Selective Catalytic Reduction (“SCR”) system to control NOx emissions. (*See* Expert Report of Ryan Harrington (Ex. D) at 18-19.)<sup>7</sup>

Volkswagen AG has admitted that, at the time of manufacture, both Gen 1 and Gen 2 vehicles contained a defeat device, which detected when the vehicles were undergoing dynamometer testing using standard federal emissions testing patterns. (*See* Volkswagen AG Plea Agreement Statement of Facts (Ex. C) ¶ 34.) The defeat device switched the vehicles between a lower-emitting “dyno mode” when it detected federal dynamometer testing and a higher-emitting “road mode” when it detected normal driving patterns. (*Id.*) Thus, on Gen 1 cars, the LNT system had different operating parameters in dyno mode and road mode, and on Gen 2 cars, the SCR system had different operating parameters in dyno mode and road mode. (Harrington Rep. (Ex. D) at 28-29.)

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<sup>4</sup> *See, e.g.*, Volkswagen AG Plea Agreement Statement of Facts (Ex. C) ¶ 49 (alleging Volkswagen AG “sought ways to improve [the defeat device’s] operation in existing 2.0 Liter Subject Vehicles”); Salt Lake Third Am. Compl. ¶ 42 (ECF No. 4456) (paraphrasing VWAG plea agreement description of updates to 2.0-liter vehicles); Hillsborough First Am. Compl. ¶¶ 87-88 (ECF No. 4457) (same).

<sup>5</sup> As relevant to this litigation: Model Year 2010-14 Volkswagen Jetta, Golf, and Sportwagen, Model Year 2013-14 Volkswagen Beetle, and Model Year 2010-13 Audi A3.

<sup>6</sup> Model Year 2012-14 Volkswagen Passat.

<sup>7</sup> The replacement software was released as part of recalls bearing campaign codes 23O6 and 23N4 (Gen 1) and 23N5 (Gen 2) and the following field fix codes: FF\_AV2 0U5N\_10\_14; FF\_BV2 0U5N\_09\_14; FF\_CV2 0U5N\_08\_14; FF\_DV2 0U5N\_05\_14; FF\_EV2 0U5N\_02\_14; FF\_CV2 0U4S\_05\_14; FF\_DV2 0U4S\_05\_14; FF\_EV2 0U4S\_02\_14; and FF\_CV2 0U4S\_05\_14.

**B. The WVU Study and the Development of the Replacement Software**

In early 2014, researchers at West Virginia University published a study showing excess emissions from Volkswagen 2.0-liter diesel vehicles during on-road emissions testing (the “WVU Study”). (Volkswagen AG Plea Agreement Statement of Facts (Ex. C) ¶ 52.) The WVU Study showed excess emissions because WVU tested the cars by driving them on the road with a PEMS unit, instead of running the cars through the standard federal dynamometer emissions testing patterns that the defeat device was configured to detect. (*See, e.g.*, Harrington Rep. (Ex. D) at 31-32.) Because the defeat device “was designed to identify regulatory test cycles and not regular, on-road driving by consumers,” PEMS testing that deviated from standard dynamometer test cycles caused Affected Vehicles to operate in the higher-emitting “road mode.” (*Id.*)

In response to the WVU Study and scrutiny from EPA and CARB, Volkswagen AG developed replacement ECU software that—while it did not remove the defeat device and also modified its operation—improved the performance of emissions controls while in “road mode,” and so lowered on-road emissions. (Harrington Rep. (Ex. D) at 33-34.) The replacement software accomplished this by, among other things, increasing the frequency with which the LNT in Gen 1 vehicles “regenerated,” allowing the LNT to absorb more NO<sub>x</sub>, and, for Gen 2 vehicles, increasing the amount of ammonia on the SCR catalyst, allowing for the elimination of additional NO<sub>x</sub> before reaching the tailpipe. (*Id.* at 35-36.) In addition to these operations, the replacement software also included the configurations that the Counties refer to as the “SWARF” and the “Start Function.” (*Id.* at 37.)

**C. 2014 Testing by Volkswagen AG Demonstrated that the Replacement Software Resulted in Significant Emissions Reductions**

In October 2014, prior to releasing the replacement software to VWGoA for installation on vehicles in the field, Volkswagen AG presented the results of its own on-road PEMS emissions testing to both the EPA and CARB. In its presentation, Volkswagen AG explained: “Today Volkswagen can provide calibrations for the Gen1 and the Gen2 engine showing significantly better emission performance on road, in customer’s hands.” (VW-COUNTIES-00108382 (Ex. E) at 387.) The presentation contained the results of PEMS testing Volkswagen

AG had conducted on a Gen 1 car and a Gen 2 car before and after installing the replacement software. This PEMS testing used three of the same routes used in the WVU Study—an “Urban LA,” “Uphill/Downhill,” and “Highway” routes. (*Compare* VW-COUNTIES-00108429 (Ex. F) at -438-41, *with* VW-COUNTIES-00108499 (Ex. G) at -525-32.)

The results of this PEMS testing are excerpted below as Figures 1 and 2. In the charts, the orange “VW PEMS” bars show the emissions with the *original* software, the blue “optimized data set” bars refer to the emissions with the *replacement* software. As shown below, for *both* generations across *all* routes, the testing showed a significant reduction in emissions after installing the replacement software:<sup>8</sup>

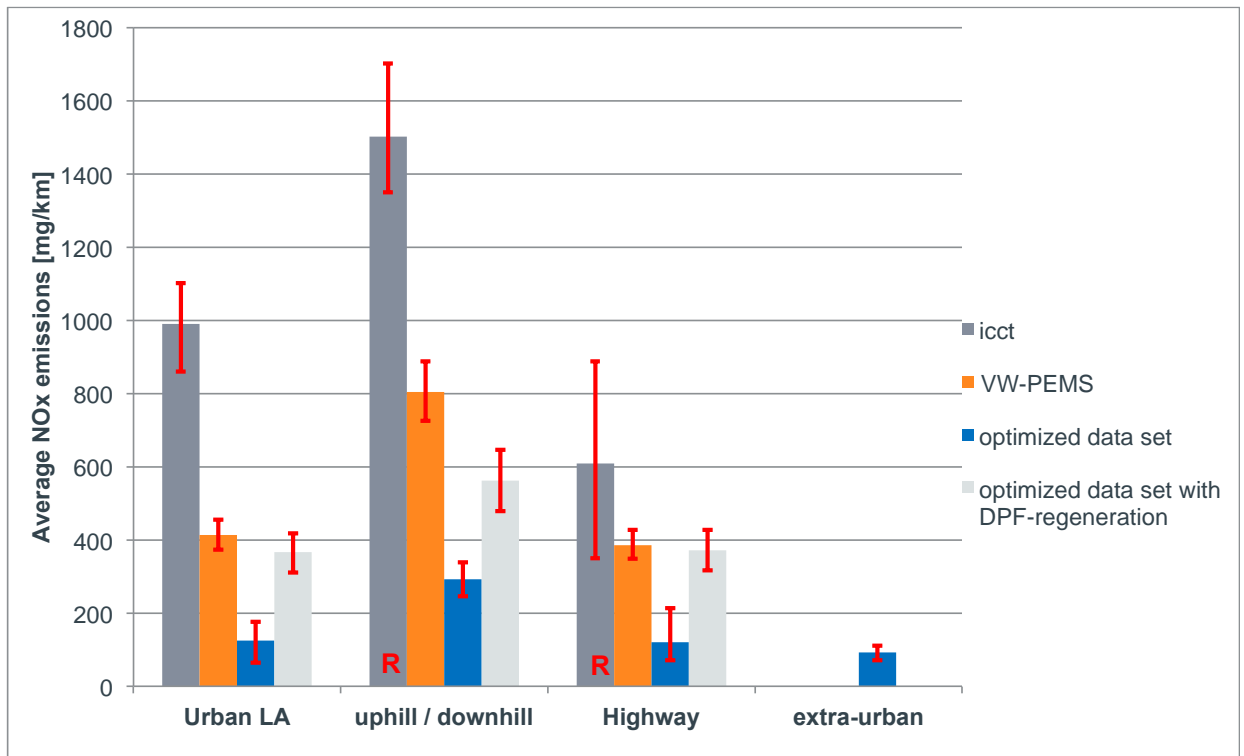


Figure 1 – Summary of VW AG PEMS Testing of Gen 1 Replacement Software (VW-COUNTIES-00108382 (Ex. E) at 387)

<sup>8</sup> “The gray “icct” bars denote the results of the WVU Study. The WVU Study results labeled “R” and the white “optimized data set with DPF-regeneration” bars refer to tests during which a diesel particulate filter (“DPF”) regeneration occurred. DPF regenerations are a normal part of diesel aftertreatment operation and are necessary to clear the DPF of accumulated soot. (*See* Harrington Rpt. (Ex. D) at 17-18.) Because NOx emissions are temporarily elevated during a DPF regeneration event, test results that include a DPF regeneration are not comparable with results that did not include a regeneration.

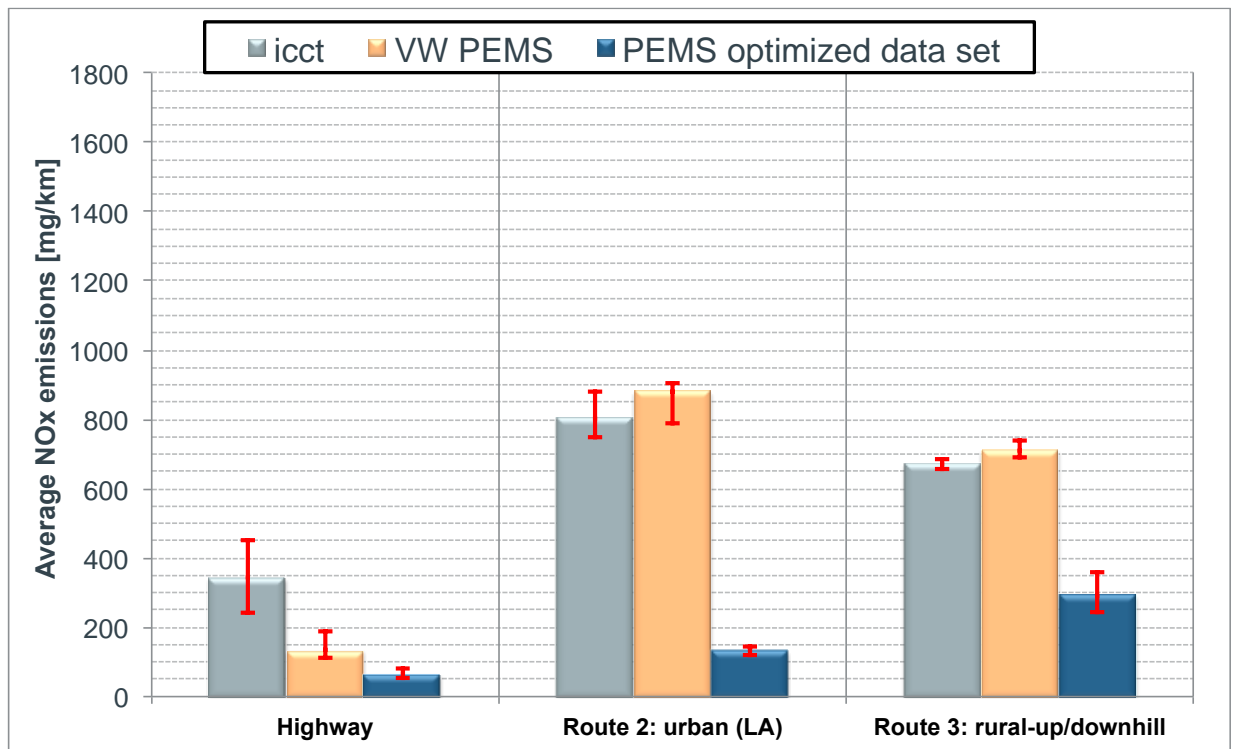


Figure 2 – Summary of VW AG PEMS Testing of Gen 2 Replacement Software (VW-COUNTIES-00108382 (Ex. E) at 388)

Overall, these test results showed that the replacement software reduced emissions for both Gen 1 and Gen 2 vehicles by over 50% on average across the *same* test routes used in the WVU Study.

#### **D. The Installation of the Replacement Software**

Following the presentation of these test results, Volkswagen initiated voluntary recalls and associated field fixes to install the replacement software on in-use Gen 2 and Gen 1 vehicles in late 2014 and early 2015, respectively. To facilitate the installation of the replacement software, Volkswagen AG uploaded an encrypted software file containing the entire replacement software to a server accessible to VWGoA. (Expert Report of Dr. John K. Bennett (ECF No. 7954-3) at 56-57, 73.) VWGoA did not have the ability to examine or alter the software files provided by Volkswagen AG. (*Id.* at 62.) VWGoA in turn hosted the files it received from Volkswagen AG on servers in the United States, which were in turn accessible by dealerships. (*Id.* at 56-58.) Dealerships installed the replacement software by connecting a computer to the vehicle's onboard diagnostic port, which would download the file from VWGoA's servers and then install it on that vehicle. (*Id.* at 58-60.) The replacement software replaced the entirety of the memory contained

1 on the emissions control unit, *i.e.*, it fully removed and replaced the preexisting software in a single  
 2 step. (*Id.* at 72.)

### 3 **E. CARB’s PEMS Testing Confirmed Volkswagen AG’s PEMS Testing Results**

4 In response to Volkswagen AG’s presentation of its testing results, CARB did not  
 5 simply take Volkswagen AG’s word for it—CARB worked to “verify the fix.” (VW-COUNTIES-  
 6 00085313 (Ex. H) at -313.) CARB performed its own testing of the replacement software using a  
 7 PEMS unit, which CARB viewed as a “good screening tool to look at real-world emissions that  
 8 were being emitted from vehicles.” (Hebert Tr. (Ex. I) at 19:16-18.) As described in the test plan  
 9 prepared by CARB, the purpose of the program was to “conduct an on-road and laboratory  
 10 emissions test program on two California certified Volkswagen (VW) diesel vehicles to evaluate  
 11 the effectiveness of their corrective action for the high NOx conditions discovered by West  
 12 Virginia University.” (VW-COUNTIES-00073050 (Ex. J) at -050.) CARB was to use a PEMS  
 13 device to measure the vehicles’ on-road NOx emissions “in an as-received condition” (*i.e.*, without  
 14 the replacement software) and “with the new calibration installed” (*i.e.*, with the replacement  
 15 software) to determine the emissions impact of the replacement software. (*Id.*) CARB’s test  
 16 program would include two routes: an “Uphill/Downhill Drive Route” and a “Heavy Demand  
 17 Freeway Route,” also called the inbound/outbound route or the Oxnard Route. (*Id.* at -053.) The  
 18 test plan explained that the “test routes were designed to follow basic everyday driving patterns.”  
 19 (*Id.*)

20 Between May and July 2015, CARB tested the Gen 2 original and replacement  
 21 software. (VW-COUNTIES-00098932 (Ex. K) at -943 to -944). The results of this testing were  
 22 consistent with the results Volkswagen AG had presented to CARB. Figures 3 and 4 excerpt two  
 23 slides prepared by CARB summarizing the numerical results of CARB’s PEMS testing, and Figure  
 24 5 converts these numerical results into a graph for demonstrative purposes.<sup>9</sup> They show the Gen 2  
 25 replacement software reduced on-road emissions by 77.5% on the uphill route (going from 2.14  
 26

27  
 28 <sup>9</sup> The “A Condition” in Figure 5 represents emissions prior to the replacement software, and  
 the “B Condition” represents emissions with the replacement software installed.



mg/mile with the original software to 0.48 mg/mile with the replacement software) and consistently reduced NOx emissions across all test routes by an average of approximately 50%:

### PEMS Testing Summary – Up/Down Hill

Uphill NO <sub>x</sub> Emissions				
Date	Baseline (mg/mile)	Calibration Fix (mg/mile)	Percent Change (%)	
5/26/2015	2.09			
5/27/2015	1.92			
5/28/2015	2.42			
7/2/2015		0.60		
7/8/2015		0.39		
7/10/2015		0.45		
AVERAGE	2.14	0.48		
STD	0.25	0.11		
Downhill NO <sub>x</sub> Emissions				
Date	Baseline (mg/mile)	Calibration Fix (mg/mile)	Percent Change (%)	
5/26/2015	0.40			
5/27/2015	0.39			
5/28/2015	0.30			
7/2/2015		0.37		
7/8/2015		0.31		
7/10/2015		0.29		
AVERAGE	0.36	0.32		
STD	0.06	0.04		

12

### PEMS Testing Summary – Oxnard Route

ARB to Oxnard NO <sub>x</sub> Emissions			
Date	Baseline (mg/mile)	Calibration Fix (mg/mile)	Percent Change (%)
5/19/2015	0.82		-56.1
5/20/2015	0.51		
5/22/2015	0.52		
7/3/2015		0.26	
7/7/2015		0.31	
7/9/2015		0.24	
AVERAGE	0.62	0.27	
STD	0.18	0.03	

Oxnard to ARB NO <sub>x</sub> Emissions			
Date	Baseline (mg/mile)	Calibration Fix (mg/mile)	Percent Change (%)
5/19/2015	1.00		-57.7
5/20/2015	0.54		
5/22/2015	0.47		
7/3/2015		0.33	
7/7/2015		0.23	
7/9/2015		0.29	
AVERAGE	0.67	0.28	
STD	0.29	0.05	

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Figures 3 and 4 – CARB Gen 2 Testing Results  
(VW-COUNTIES-00098932 (Ex. K) at -943 to -944)

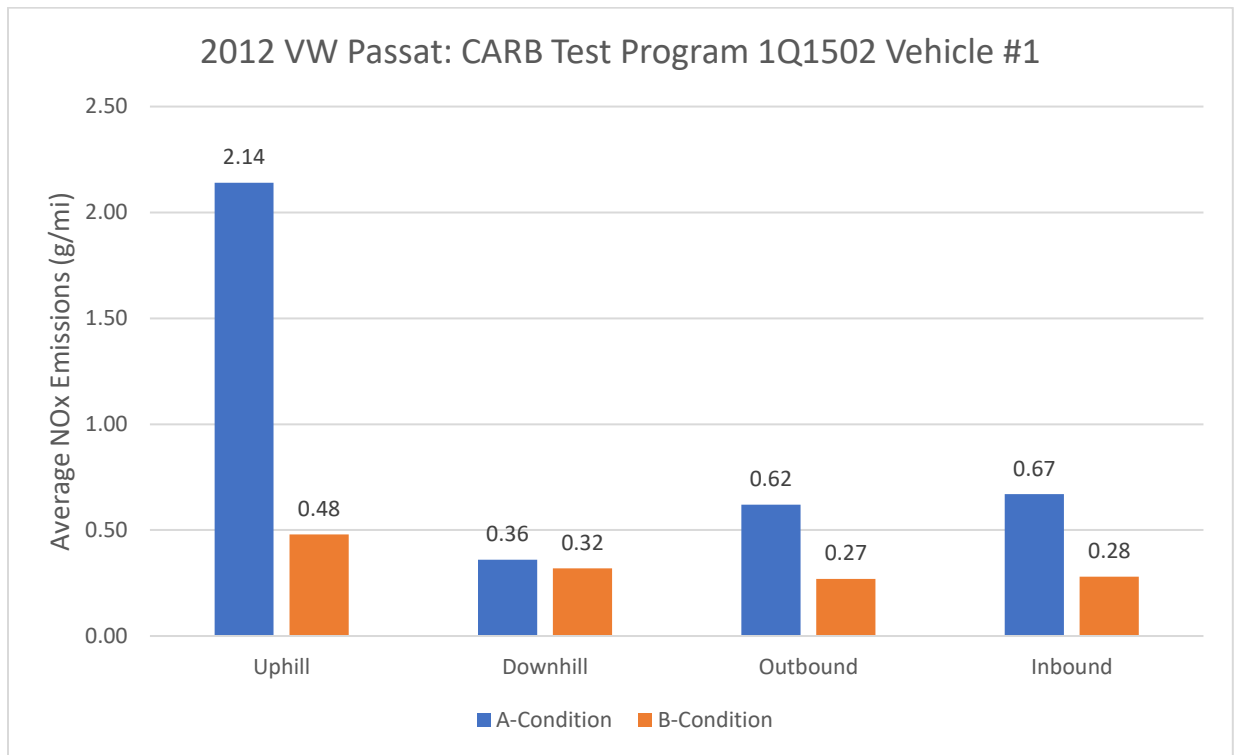


Figure 5 – Graphical Depiction of CARB’s Gen 2 Testing Results

As one CARB presentation concluded, the Gen 2 replacement software showed “[s]ignificant NOx reduction in on-road testing.” (VW-COUNTIES-00079279 (Ex. L) at -287 (emphasis added).) And in this litigation, CARB’s corporate representative testified that “the over-the-road testing definitely showed some NOx improvement after” the installation of the replacement software. (Hebert Tr. (Ex. I) 65:2-4.)

CARB also conducted PEMS testing of a vehicle with the Gen 1 replacement software installed, and separately tested a different Gen 1 vehicle without the replacement software on comparable test routes. (See Harrington Rep. (Ex. D) at 45-49.) Although a CARB representative did not recall at her deposition over six years later that the Gen 1 replacement software reduced emissions (Hebert Tr. (Ex. I) 190:10-22, 205:17-24), CARB’s results, shown in Figure 6, are clear. The blue “A” condition bars represent the emissions from the car with the original software, and the orange “B” condition bars represent the emissions from the car with the



replacement software.<sup>10</sup> As Mr. Harrington confirmed in his report, the vehicle with the replacement software had consistently lower on-road emissions than the vehicle with the original software:

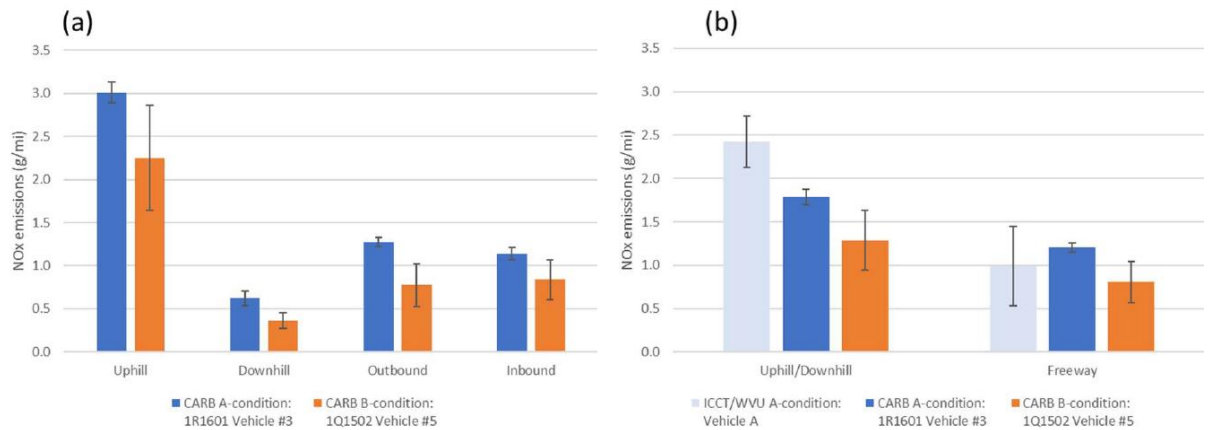


Figure 6 – Comparison of CARB’s Gen 1 PEMS Results (Harrington Rep. (Ex. D) at 49)

## F. The Notices of Violation and Subsequent Consent Decree

While CARB’s testing showed that the replacement software reduced emissions, EPA and CARB continued to investigate because the Affected Vehicles, even with the replacement software, still showed a significant discrepancy between the reduced on-road NOx emissions and the even lower NOx emissions measured on a dynamometer. In August 2015, Volkswagen AG admitted that the Affected Vehicles used different emissions control strategies when the vehicle detected that it was being tested on a dynamometer versus on the road. (Statement of Facts (Ex. C) ¶ 62.) On September 18, 2015, both CARB and EPA issued Notices of Violation regarding the defeat device. (See EPA Notice of Violation (Ex. B); CARB In-Use Compliance Letter (Ex. A).) Although finding that the cars did not comply with EPA and CARB regulations due to the presence of a defeat device that caused the vehicles to operate in different modes (road and dyno), both notices acknowledged that the replacement software improved emissions. (See n. 2, *supra*.)

Volkswagen dealers continued to install the replacement software until October 2016, just prior to the entry of Volkswagen’s First Partial Consent Decree with the DOJ. (See

<sup>10</sup> The light blue “ICCT/WVU A-condition bar” represents results from the WVU Study.

VWGoA\_TX-MDL\_00199399 (CARB Subpoena Exhibit 41) (Ex. M); VWGoA\_TX-MDL\_00200798 (CARB Subpoena Exhibit 44) (Ex. N).) That Consent Decree provided for the development of an approved emissions modification (“AEM”) that would remove the defeat device and reduce emissions even further—although, for some model years, not by enough to meet federal emissions standards. (*See* First Partial Consent Decree App’x B at 9-12 (ECF No. 2103-1).)

**G. Rigorous Testing by Exponent Further Confirms the Replacement Software Significantly Reduced Emissions**

In connection with litigation challenging the installation of the replacement software, Volkswagen retained Ryan Harrington—a Principal at Exponent—to oversee and analyze additional PEMS emissions testing of the replacement software. (Harrington Rep. (Ex. D) at 5-6.) Mr. Harrington has over 20 years of experience in the automotive industry and the federal government relating to motor vehicle emissions and fuel economy standards and testing. (*Id.* at 6-7.) Exponent is an engineering and scientific consulting firm, which operates a vehicle test track at its Test and Engineering Center in Phoenix, Arizona. (*Id.* at 7, 52.)

Exponent formulated a detailed test plan—which was based on CARB’s 2015 testing program—in order to assess the emissions impact of the replacement software. Exponent’s testing significantly expanded upon CARB’s testing in both the number and variety of vehicles tested. Exponent tested four additional Gen 1 vehicles from three separate model years, and three additional Gen 2 vehicles—covering every affected model year of Gen 2 vehicle. Exponent’s testing included vehicles of different models, vehicles with both automatic and manual transmissions, vehicles with both low and high mileage, and vehicles ranging from MY 2010 to MY 2014 (the entire relevant MY range). (*Id.* at 52-53.)<sup>11</sup>

<sup>11</sup> The vehicles tested were (*see* Harrington Rep. (Ex. D) at 52):

GEN	Make/Model	Model Year	Test Vehicle #	VIN	Mileage (mi)	Transmission
1	VW Jetta SW TDI	2013	1	3VWPL7AJ3DM671488	27,588	Automatic
	VW Jetta TDI	2014	2	3VWLL7AJXEM311344	55,743	Automatic
	VW Jetta TDI	2013	3	3VW3L7AJ8DM400246	71,377	Manual
	Audi A3	2010	4	WAUBJAFM0AA127393	75,271	Automatic
2	VW Passat TDI	2012	5	1VWBN7A30CC016209	93,763	Auto
	VW Passat TDI	2014	6	1VWBN7A30EC075974	60,418	Auto
	VW Passat TDI	2013	7	1VWBN7A35DC142227	66,163	Manual

Like CARB and Volkswagen AG, Exponent measured the NO<sub>x</sub> output by using a PEMS. (*See* Figure 7, below.) The PEMS equipment was provided and installed by subcontractor Emissions Analytics—the same firm that provided and installed the PEMS equipment used in testing the AEM for CARB and EPA. (*See* Proposed Emissions Modification: Part C (Ex. O) at 7.) Exponent tested the vehicles on a track using a throttle controller—a device that can precisely execute pre-programmed throttle inputs—allowing for an effective simulation of real-world driving while also ensuring the repeatability of tests and comparability of results. Using this controller, Exponent took the exact speed profiles of the actual trips driven as part of the WVU and CARB PEMS testing programs and input them to the throttle controller to precisely replicate the prior test routes. (Harrington Rep. (Ex. D) at 51-57.) The testing included an inbound trip taken from CARB’s testing, which simulated freeway driving conditions, and an urban trip from the WVU Study, which simulated city driving under stop-and-go conditions. (*Id.* at 52-54.) Exponent was further able to replicate the effects of uphill driving using a towing dynamometer, a device which applies additional load to the vehicle axle, simulating the strain of the additional load of ascending a steep grade. (*Id.* at 57-59.)<sup>12</sup>

Because emissions regulators do not have standardized PEMS testing routes, these three routes were chosen both to reflect conditions that CARB and WVU previously determined were appropriate to test the emissions impact of the replacement software, and to provide results across a broad range of real-world driving conditions. Exponent drove each of these three test routes twice for each of the seven test vehicles. Exponent’s detailed test plan also outlined standard procedures for preparing vehicles for testing, ensuring comparable testing conditions (*e.g.*, ambient temperature), and identifying invalid tests. (*See id.* App. G.)

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<sup>12</sup> A towing dynamometer is not the same device as the chassis dynamometer used for regulatory emissions tests. The test cycles run with the towing dynamometer were still run on the test track with a PEMS unit attached, not in a laboratory, and did not use a chassis dynamometer.

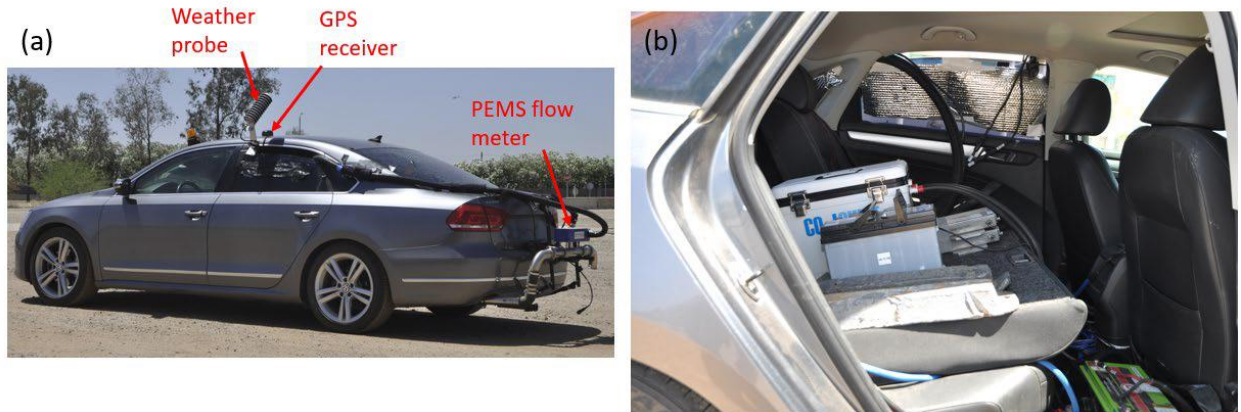


Figure 7 – Test Vehicle with PEMS Equipment Installed by Emissions Analytics

The results of Exponent’s testing are consistent with the prior test results from VWAG and CARB. In Figures 8 and 9—based on data from Mr. Harrington’s report—the blue “A” condition bars represent NO<sub>x</sub> emissions from the vehicle with the original software, and the orange “B” condition bars represent NO<sub>x</sub> emissions from the vehicle with the replacement software.<sup>13</sup> The replacement software consistently reduced emissions across each of the test routes for both Gen 1 and Gen 2 by a substantial margin:

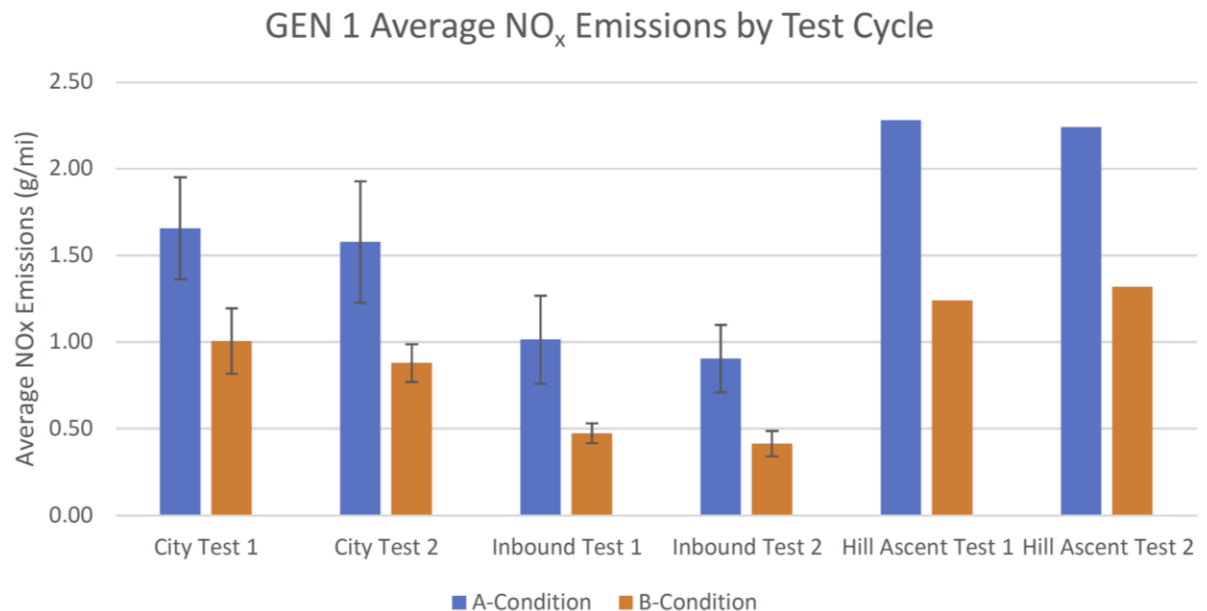


Figure 8 – Summary of Exponent’s Gen 1 Emissions Testing (Harrington Rep. (Ex. D) at 61)

<sup>13</sup> In certain instances, the “A-Condition” bar represents an average result among two different software versions that the replacement software was installed to replace. See Harrington Rep. (Ex. D) at 60-63 for more detail.

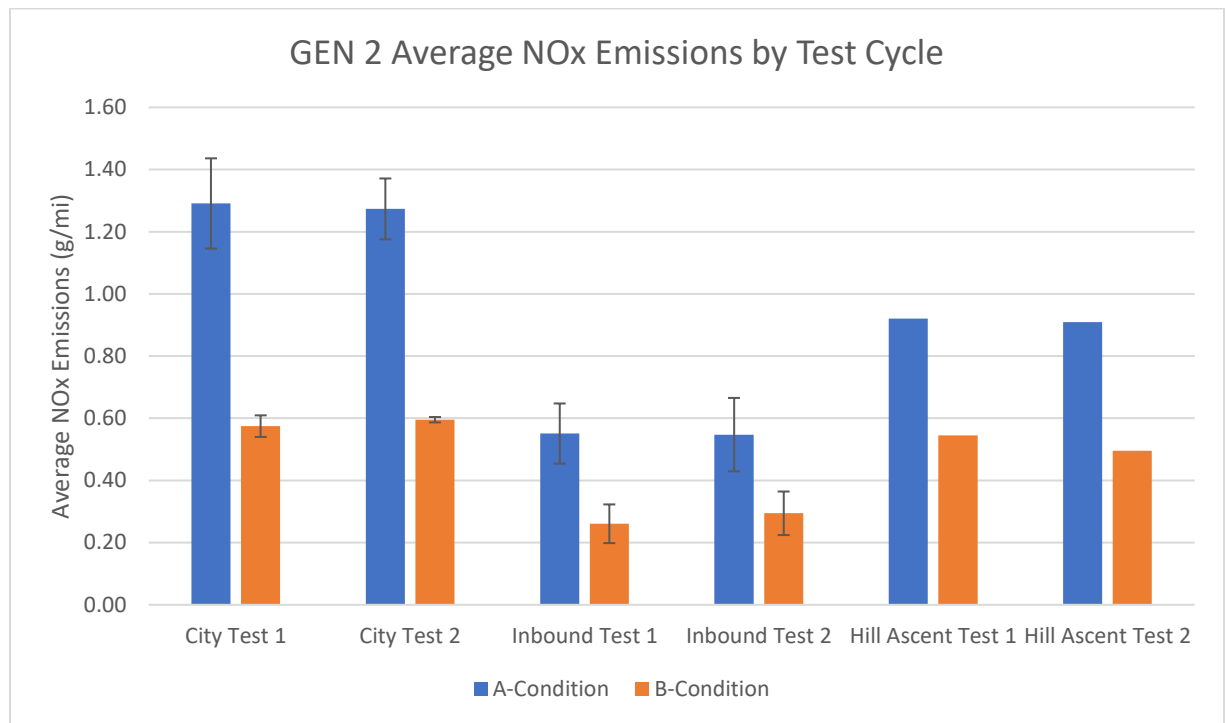


Figure 9 – Summary of Exponent’s Gen 2 Emissions Testing  
(See Harrington Rep (Ex. D) at 63)

The reductions in emissions were significant across all routes. On average, the Gen 1 replacement software reduced NOx emissions by approximately 41% on the City route, 53% on the Inbound (highway) route, and 43% on the Hill Ascent route. (*Id.* at 60.) The Gen 2 replacement software reduced NOx emissions by approximately 54% on the City route, 50% on the Inbound (highway) route, and 43% on the Hill Ascent route. (*Id.* at 62.) As noted by Mr. Harrington, these results are “consistent with the confirmatory testing conducted by CARB that showed substantial improvement in on-road NOx emissions.” (*Id.* at 10.)

And not only were the *average* emissions across each Generation lower for each test route, *every single vehicle* Exponent tested *individually* performed better on *every* test route, as illustrated in Figures 10-16 below. (*Id.* at 60-63.) In other words, whether being driven in city, highway, or uphill conditions, the replacement software caused every vehicle that was tested to emit less NOx:

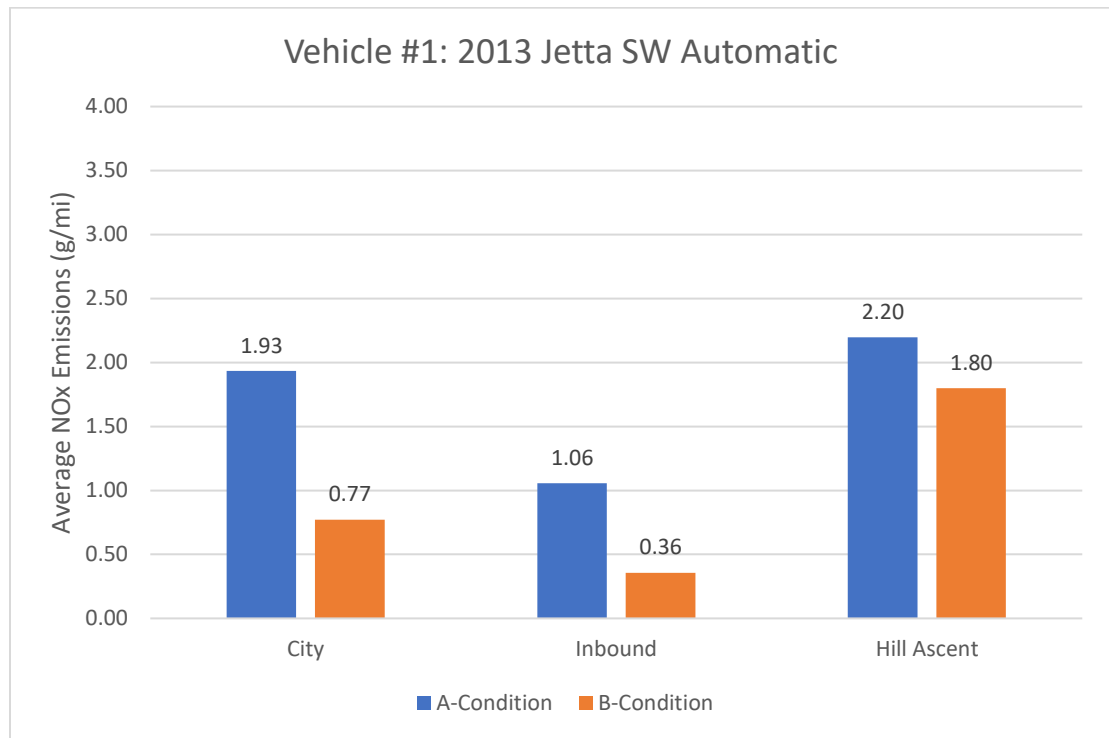


Figure 10 – Vehicle #1 Test Results

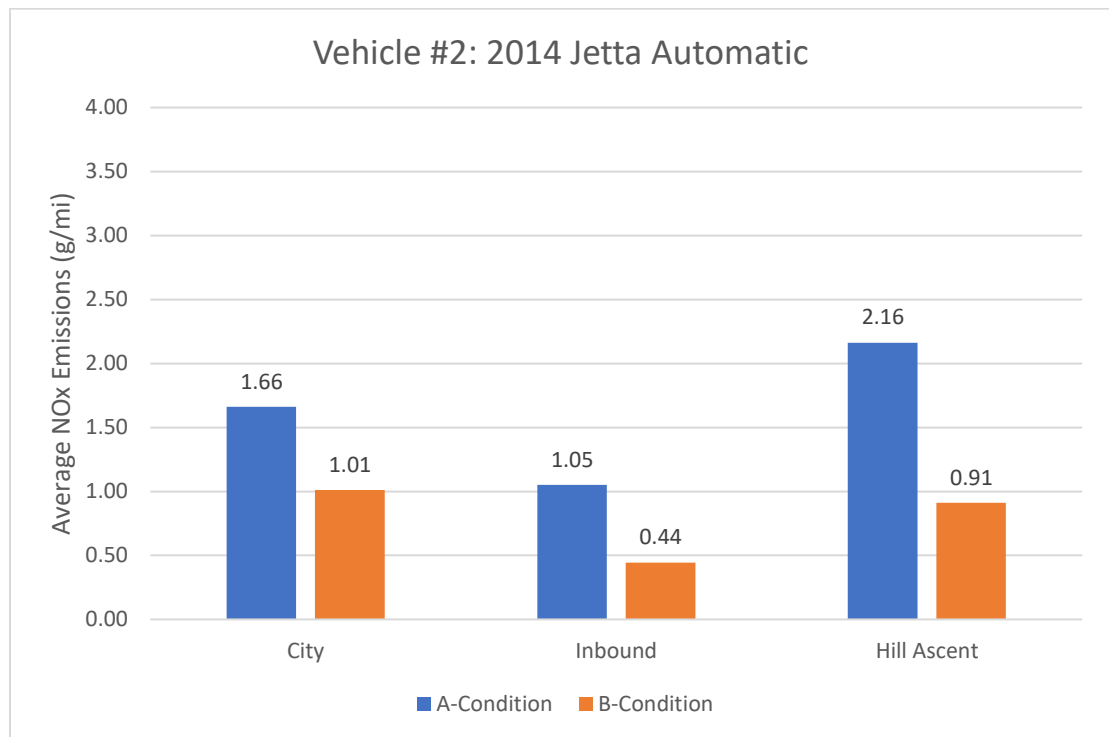


Figure 11 – Vehicle #2 Test Results

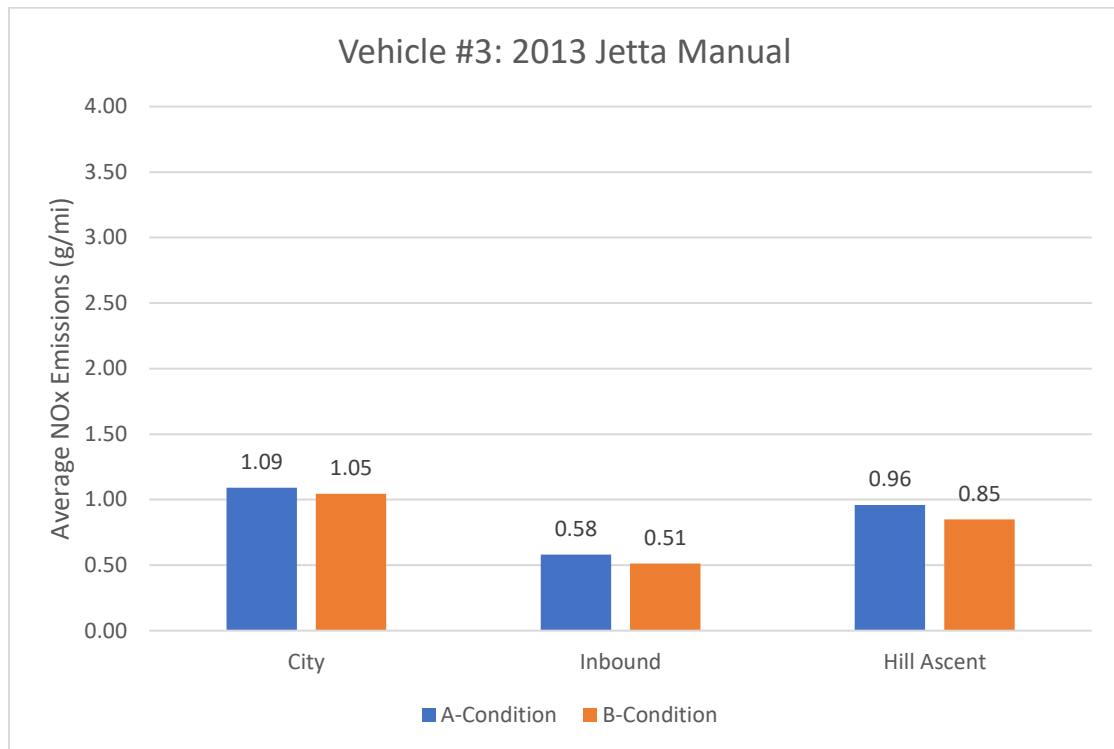


Figure 12 – Vehicle #3 Test Results

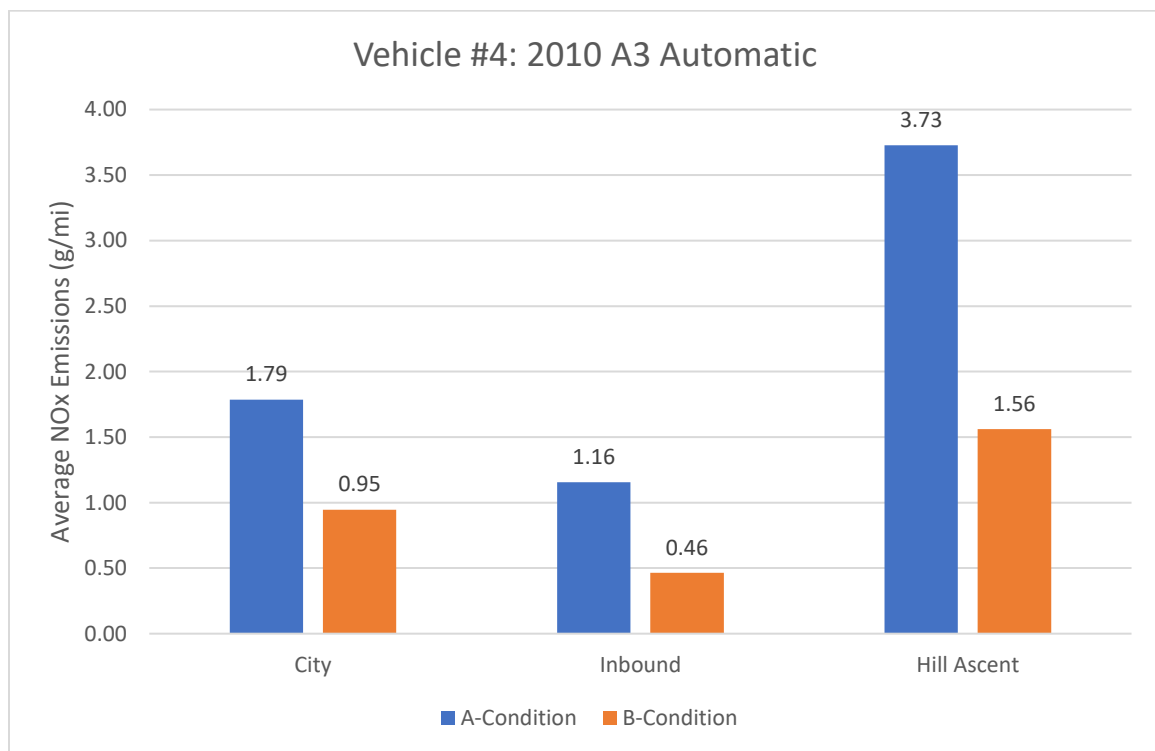


Figure 13 – Vehicle #4 Test Results

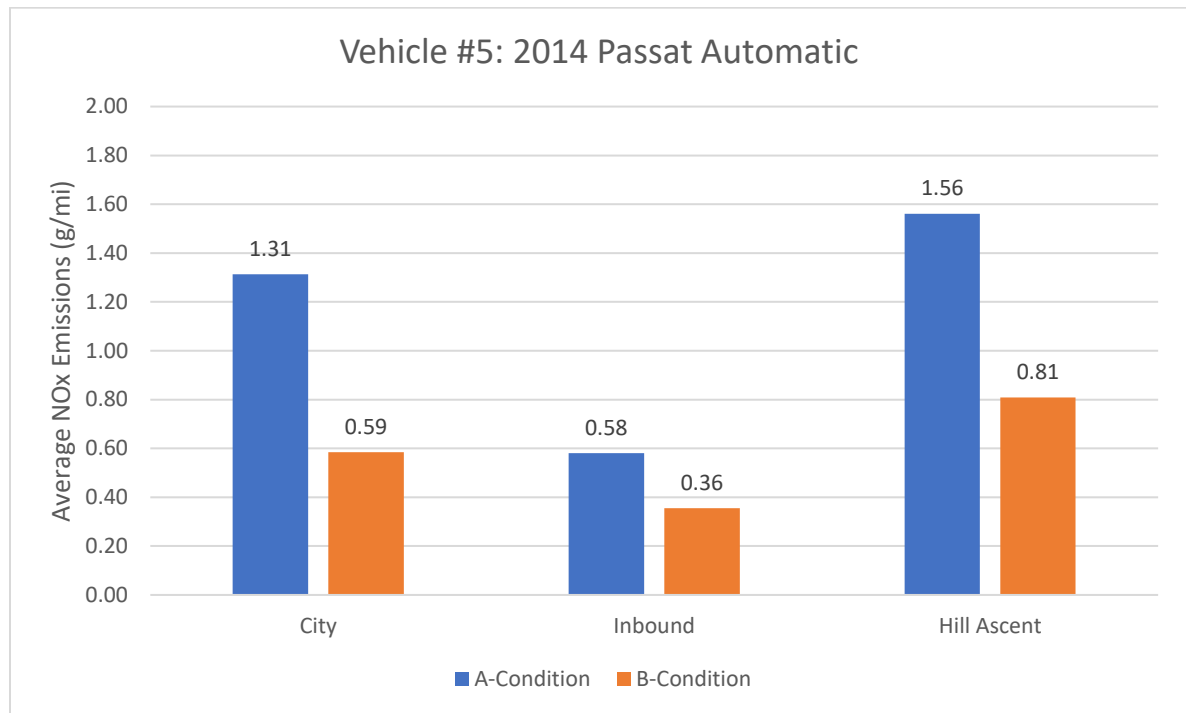


Figure 14 – Vehicle #5 Test Results

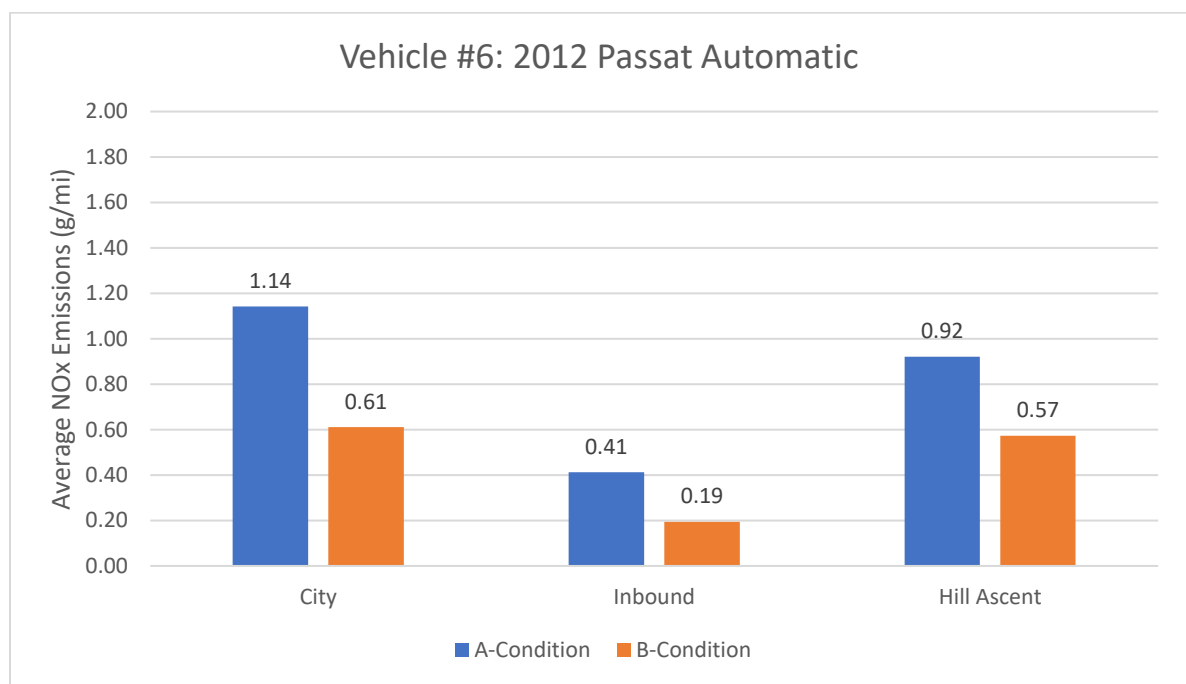


Figure 15 – Vehicle #6 Test Results



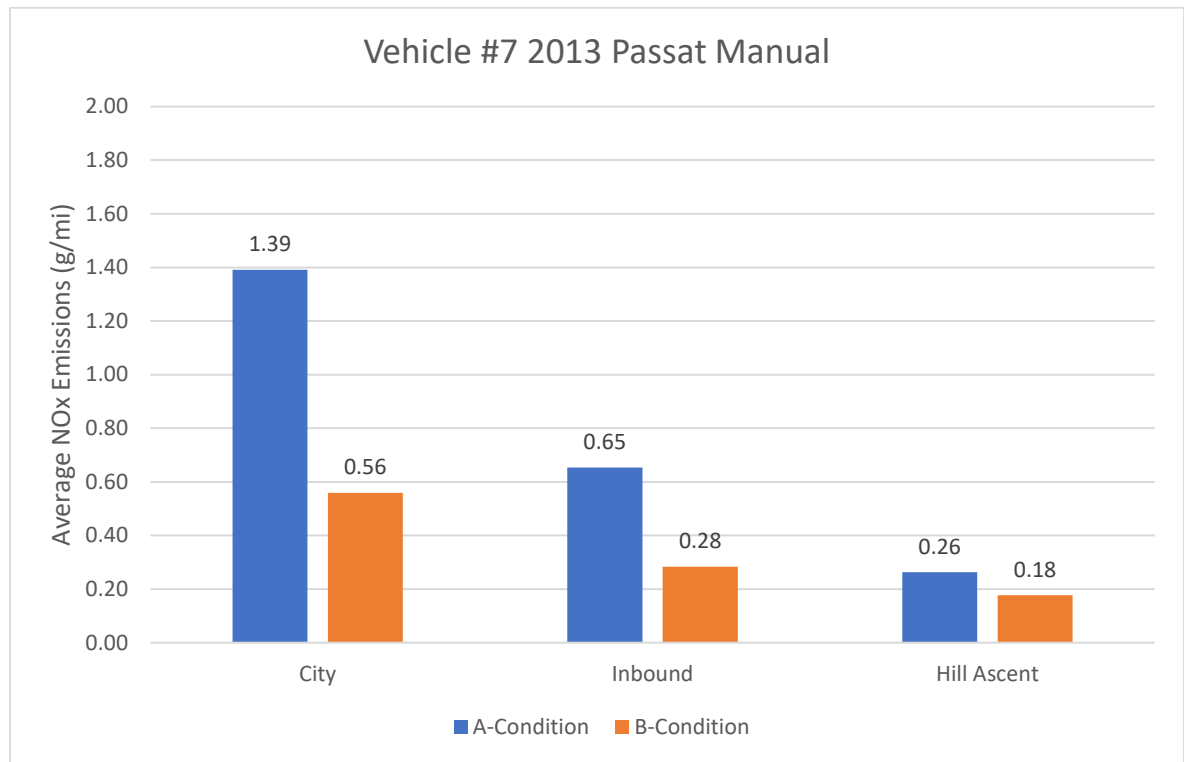


Figure 16 – Vehicle #7 Test Results

### LEGAL STANDARD

This Court should grant summary judgment where, as here, the movant demonstrates that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In other words, summary judgment should be entered against a party “who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Parth v. Pomona Valley Hosp. Med. Ctr.*, 630 F.3d 794, 798-99 (9th Cir. 2010).

The moving party may satisfy its burden at summary judgment by “either produc[ing] evidence negating an essential element of the nonmoving party’s claim or defense or show[ing] that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

If the moving party meets its burden, then the non-moving party “must go beyond the pleadings and identify facts which show a genuine issue for trial.” *Cline v. Indus. Maint. Eng’g*

1 & Contracting Co., 200 F.3d 1223, 1229 (9th Cir. 2000). “[T]he mere existence of some alleged  
 2 factual dispute between the parties will not defeat an otherwise properly supported motion for  
 3 summary judgment”; “[o]nly disputes over facts that might affect the outcome of the suit” will  
 4 preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

## 5 ARGUMENT

### 6 **I. SUMMARY JUDGMENT SHOULD BE ENTERED BECAUSE THERE IS NO** 7 **DISPUTE THAT THE REPLACEMENT SOFTWARE REDUCED EMISSIONS.**

8 In its July 15, 2022 Order, the Court directed that “[t]he next issue to be resolved  
 9 is whether the post-sale software modification in this case violated the Counties’ regulations by  
 10 increasing vehicle emissions relative to emissions before the modification.” (July 15, 2022 Order  
 11 at 2 (ECF No. 8003).) The uncontroverted evidence described above provides a clear and  
 12 consistent answer: not only did the replacement *not* increase emissions, it *significantly reduced*  
 13 them.

14 The replacement software was designed to lower NOx emissions, and significantly  
 15 increased the effectiveness of the emissions controls of the Affected Vehicles in “road mode.”  
 16 (See Section B *supra*.) This emissions reduction was clear at the time the replacement software  
 17 was released. Volkswagen AG’s 2014 PEMS testing showed a 50% reduction in NOx emissions  
 18 over the routes used in the WVU Study. (See Section C *supra*.) CARB’s 2015 PEMS testing  
 19 program showed “significant” NOx reductions, including reductions of up to 77.5% over one route  
 20 for Gen 2 vehicles, and an average of 50% for Gen 2 vehicles, and 30.5% for Gen 1 vehicles. (See  
 21 Section E *supra*.)

22 Exponent’s testing confirms these results on a broader basis. Mr. Harrington’s  
 23 report shows emissions reductions for *every car tested across every route tested*, and an average  
 24 NOx reduction of 45% for Gen 1 Affected Vehicles and 50% for Gen 2 Affected Vehicles. (See  
 25 Section G *supra*.) The Counties have pointed to no evidence that would put these test results in  
 26 dispute, let alone any evidence which would show that the replacement software *increased*  
 27 emissions. Accordingly, the installation of the replacement software cannot possible have  
 28

“violated the Counties’ regulations by increasing vehicle emissions.” (July 15, 2022 Order at 2 (ECF No. 8003).)

**II. BECAUSE THE REPLACEMENT SOFTWARE REDUCED EMISSIONS, THERE WAS NO VIOLATION OF LAW.**

This Court previously recognized that “[t]he Hillsborough County and Utah regulations appear to exclude from liability post-sale changes that reduce emissions.” (Feb. 23 Order at 2 (ECF No. 7944).) That is the correct interpretation of the applicable provisions.

**A. Utah’s Anti-Tampering Provision Provides an Explicit Safe Harbor for Conduct that Does Not Worsen Emissions.**

Utah’s anti-tampering provision contained in the second sentence of Utah Admin. Code R307-201-4—which forms the basis of Salt Lake’s first claim for relief—could not be clearer. It provides:

No person shall remove or make inoperable the system or device or any part thereof, *except for the purpose of installing another system or device, or part thereof, which is equally or more effective in reducing emissions from the vehicle to the atmosphere.*

Utah Admin. Code R307-201-4 (emphasis added). Under the unambiguous language of this rule, installation of replacement emissions software is prohibited only if that act *worsens* emissions.

This plain-text interpretation is reinforced by the rule’s express purpose set out in its enabling statute: “to achieve and maintain levels of air quality which will protect human health and safety.” Utah Code Ann. § 19-2-101(2); *see In re Adoption of Baby E.Z.*, 266 P.3d 702, 707 (Utah 2011) (“Our overall goal is to give effect to the legislative intent, as evidenced by the [statute’s] plain language, in light of the purpose the statute was meant to achieve.” (brackets in original)); *DaVita Inc. v. Va. Mason Mem’l Hosp.*, 981 F.3d 679, 692-93 (9th Cir. 2020) (“[W]e may consider the purpose of the statute in its entirety, and whether the proposed interpretation would frustrate or advance that purpose.”). Prohibiting software updates that *improve* air quality would contradict this core objective.<sup>14</sup>

<sup>14</sup> For the same reasons, this Court should grant summary judgment dismissing Salt Lake’s third claim for relief under Utah’s Pattern of Unlawful Activity Act, Utah Code Ann. §§ 76-10-1601 *et seq.*, to the extent that it relies on a predicate violation of the tampering rule. (*See* Salt Lake Cnty. Third Am. Compl. ¶ 71.a.)

Salt Lake is not saved by its puzzling argument during the July 15, 2022 hearing that the references to “compliance with the Federal motor vehicle rules” and the requirement to “maintain the system or device in operable condition” in the first sentence of R307-201-4 authorizes it to penalize any act—even one that reduces emissions—that does not leave the car in full compliance with “Federal motor vehicle rules.” (*See* Tr. of July 15, 2022 Hrg. (Ex. P) at 15:8-16:3.) To posit that theory, Salt Lake simply skipped over the first part of that sentence, which demonstrates that it is irrelevant to this action: “**Any person owning or operating any motor vehicle . . . on which is installed or incorporated a system or device for the control of crankcase emissions or exhaust emissions in compliance with the Federal motor vehicle rules, shall maintain the system or device in operable condition and shall use it at all times that the motor vehicle or motor vehicle engine is operated.**” Utah Admin. Code R307-201-4 (emphasis added).

Nor does this sentence somehow inject into the anti-tampering provision contained in the second sentence of R307-201-4 a requirement to bring cars into compliance with federal emissions standards. As noted above, the plain text of the anti-tampering safe harbor says “equally or more effective in reducing emissions”—not “compliant with federal emissions standards.” By Salt Lake County’s logic, even the AEMs authorized by EPA and CARB as part of the October 2016 Consent Decree would be unlawful in Utah, because they did not bring certain cars into compliance with federal emissions standards.<sup>15</sup>

And in any event, this Court already ruled, and the Ninth Circuit affirmed, that any claim that the replacement software was unlawful because it did not fully remedy excess NOx attributable to the defeat device would be preempted by the Clean Air Act, because it is predicated on the cars being non-compliant with federal standards *as manufactured*. *See In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Products Liab. Litig.*, 959 F.3d 1201, 1218 (9th Cir. 2020) (“Because the Counties’ rules attempt to enforce the integrity of the emission-control

<sup>15</sup> *See* First Partial Consent Decree at 3 (ECF No. 2103-1). As this Court previously acknowledged, the Counties would “jeopardize [the] balance” between federal and local authorities under the Clean Air Act “by asserting that vehicles with EPA-approved modifications continue to violate their tampering rules because the modifications do not bring the vehicles into compliance with the originally certified emission standards.” (*See* Apr. 26, 2018 Order re: Defs’ Mot. to Dismiss at 22 n.7 (ECF No. 4979).)

technology with which the pre-sale vehicles must be equipped, they attempt to enforce a standard, and are therefore preempted by § 209(a).” (internal quotation marks and citation omitted)).

**B. Conduct that Reduces Emissions Does Not Violate Utah’s Public Nuisance Statute.**

The Utah public nuisance statute underpinning Salt Lake’s fourth claim for relief is similarly inapplicable to conduct that reduced emissions. That statute prohibits conduct that “annoys, injures, or endangers the comfort, repose, health, or safety of three or more persons” or “in any way renders three or more persons *insecure in life or the use of property*.” Utah Code Ann. § 76-10-803(1) (emphasis added). Thus, even putting aside whether the factory-installed defeat devices could “annoy[], injure[], or endanger[] the comfort, repose, health, or safety” of anyone or “render[]” anyone “insecure in life or the use of property,” the post-sale conduct of reducing emissions at issue in this case could not conceivably meet this standard.

The Restatement’s description of nuisance, which requires a showing of harm or annoyance, underscores this conclusion. Restatement (Second) of Torts § 821A cmt. b (Am. L. Inst. 1979) (“‘nuisance’ has been employed in three different senses”: (i) “human activity or a physical condition that is *harmful or annoying* to others”; (ii) “the *harm* [itself] caused by the human conduct or physical condition”; and (iii) “the legal liability that arises from the combination of the two” foregoing uses); see *Whaley v. Park City Mun. Corp.*, 190 P.3d 1, 6-7 (Utah Ct. App. 2008) (applying the Restatement to interpret public nuisance under Utah Code Ann. § 76-10-803). Again, common sense dictates that reducing emissions only has the potential to reduce harm and annoyance, not to cause it.<sup>16</sup>

**C. Conduct that Reduces Emissions Does Not Violate the Relevant Hillsborough County Rule.**

The relevant portions of the anti-tampering rule underpinning Hillsborough’s sole count are likewise clear. EPC Rule 1-8.05(1) provides: “No person shall tamper, cause, or allow

<sup>16</sup> Although this motion specifically addresses only Salt Lake’s tampering and nuisance claims, Salt Lake’s other claims are fundamentally defective for various reasons, and Defendants reserve all rights in that regard, including to seek summary judgment on those claims at a later stage of this case.

1 the tampering of the emission control system of any motor vehicle.” “Tampering” is in turn  
 2 defined only as those acts that “result[] in [the emission control system] being inoperable.” EPC  
 3 Rule 1-8.03(2)(h). And an emissions control system is “inoperable” only if its “*operation or*  
 4 *efficiency* has been *circumvented, defeated, or deleteriously affected*.” EPC Rule 1-8.03(2)(c)  
 5 (emphasis added). “Circumvent” means “avoid,” Cambridge Dictionary,  
 6 <https://dictionary.cambridge.org/us/dictionary/english/circumvent> (last visited July 22, 2022);  
 7 “defeat” means “to cause someone or something to fail,” Cambridge Dictionary,  
 8 <https://dictionary.cambridge.org/us/dictionary/english/defeat> (last visited July 22, 2022); and to  
 9 “deleteriously” affect means to affect “in a harmful way,” Cambridge Dictionary,  
 10 <https://dictionary.cambridge.org/us/dictionary/english/deleteriously> (last visited July 22, 2022).  
 11 Read together, all of these terms reflect the concept of *weakening* the performance of the emissions  
 12 system. See *Nehme v. Smithkline Beecham Clinical Labs.*, 863 So. 2d 201, 205 (Fla. 2003)  
 13 (“Under the doctrine of *noscitur a sociis* (a word is known by the company it keeps), one examines  
 14 the other words used within a string of concepts to derive the legislature’s overall intent.”).  
 15 Replacement software that reduced NOx emissions cannot possibly have “circumvented, defeated,  
 16 or deleteriously affected” the “operation or efficiency” of any emissions system or component.  
 17 (See also Feb. 23 Order at 2 (ECF No. 7944); July 15 Order at 2 (ECF No. 8003).)

18 The same is true of EPC Rule 1-8.05(6), which boils down to the same key terms.  
 19 That subsection provides: “No person shall manufacture, install, sell or advertise for sale, devices  
 20 to defeat or render inoperable any component of a motor vehicle’s emission control system.” As  
 21 in subsection (1), the term “inoperable emissions system” means one whose “operation or  
 22 efficiency has been circumvented, defeated, or deleteriously affected.” Because the same terms  
 23 are used in subsections (1) and (6) of EPC Rule 1-8.05, the same analysis applies, and there can  
 24 be no violation where the challenged replacement software improved emissions.

25 Other than this Court, the Middle District of Florida is the only other court to have  
 26 construed Hillsborough’s anti-tampering provision. In dismissing Hillsborough’s similar post-sale  
 27 claims against Mercedes Benz as a matter of law, the Florida court reasoned that Hillsborough had  
 28 failed to allege “how the field fixes, recalls, or post-sale software updates tampered with the

1 vehicles' emission control systems, *such as by rendering a system even less functional than it had*  
 2 *been with the original defeat device.*" *Env't Prot. Comm'n of Hillsborough Cnty. v. Mercedes-*  
 3 *Benz*, 2022 WL 1136610, at \*5-6 (M.D. Fla. Apr. 18, 2022) (emphasis added). The Middle District  
 4 of Florida's understanding that Rule 1-8.05 is violated only when an emissions system is rendered  
 5 "less functional" underscores why emissions modifications that reduce emissions do not violate  
 6 the rule.

7 Like Salt Lake, Hillsborough has advanced the makeweight argument—including  
 8 in public statements this week following the Court's July 15, 2022 Order<sup>17</sup>—that Hillsborough  
 9 may penalize Defendants because the replacement software did not bring the cars fully into  
 10 compliance with federal standards. There is no legal support for this position anywhere in the text  
 11 of the rules, which prohibit "circumvent[ing], defeat[ing], or deleteriously affect[ing]" an emission  
 12 control system or component thereof. EPC Rule 1-8.05(1), (6). Nowhere does this language  
 13 mention federal standards, and for good reason—like Salt Lake County, Hillsborough County  
 14 lacks the authority to enforce federal standards. Indeed, the Middle District of Florida expressly  
 15 rejected this theory when Hillsborough County sought to bring claims under its anti-tampering  
 16 rules against Mercedes Benz for post-sale software updates that allegedly failed to remove a defeat  
 17 device installed during manufacture. *See Env't Prot. Comm'n of Hillsborough Cnty.*, 2022 WL  
 18 1136610, at \*5 ("These updates are not 'tampering' as defined by the [EPC] rule because they do  
 19 not cause the emissions control system to be inoperable. Rather, the original pre-sale defeat  
 20 devices—on which the Commission has not and cannot base its claims—have rendered the  
 21 emissions control system inoperable . . ."). And as shown in Section II.A, *supra*, such claims to  
 22 enforce federal standards are preempted.

23  
 24  
 25  
 26 <sup>17</sup> Linda Chiem, Law360, *Counties Can't Dig Through VW Emissions-Cheating Software*  
 27 (July 18, 2022), available at <https://www.law360.com/articles/1512627/counties-can-t-dig-through-vw-emissions-cheating-software> (Hillsborough's counsel stated that Hillsborough is  
 28 "confident that those cars with the post-sale emissions cheat device updates did . . . not meet the EPA standards").



## CONCLUSION

Defendants have provided overwhelming, uncontested evidence demonstrating that the replacement software reduced emissions. Conduct that reduced emissions does not give rise to liability under laws designed to punish conduct that makes emissions worse. For these reasons, the Court should grant Defendants summary judgment dismissing Hillsborough County's sole count; Salt Lake County's first and fourth claims for relief; and Salt Lake County's third claim for relief to the extent that it is premised on a predicate violation of Utah Admin. Code R307-201-4.

Dated: July 22, 2022

Respectfully submitted,

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**ATTESTATION (CIVIL LOCAL RULE 5-1(h)(3))**

In accordance with Civil Local Rule 5-1(h)(3), I attest that concurrence in the filing of this document has been obtained from the signatories.

Dated: July 22, 2022

SULLIVAN & CROMWELL LLP

/s/ Nicholas F. Menillo

Nicholas F. Menillo